BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

THERESA HARRIS	)	
Claimant	)	
VS.	)	
	)	Docket No. 172,992
BETHANY MEDICAL CENTER	)	
Respondent	)	
AND	)	
	)	
SELF-INSURED	)	
Insurance Carrier	)	

ORDER

Respondent appeals from an Award entered by Administrative Law Judge Steven J. Howard, dated April 7, 1994. The Appeals Board heard oral argument on May 3, 1994.

APPEARANCES

The claimant appeared by and through her attorney, Steven Treaster of Overland Park, Kansas. The respondent, a qualified self-insured, appeared by and through its attorney, Robert L. Kennedy of Kansas City, Kansas. There were no other appearances.

RECORD

The Appeals Board considered the same record listed in the April 7, 1994 Award of the Administrative Law Judge.

STIPULATIONS

The Appeals Board adopts the stipulations listed in the April 7, 1994 Award.

ISSUES

The only issue to be considered on appeal is whether claimant's injury arose out of her employment with respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board finds claimant's injury did not arise out of her employment with respondent.

Claimant was injured on December 17, 1992, when a co-employee struck her as she waited for an elevator to take a food tray to a patient. The record establishes that claimant had been harassed by the same co-employee on previous occasions. Claimant had reported the harassment to her supervisors. There is no evidence to indicate respondent had taken any action to prevent future harassment. The evidence does not establish with any certainty the reason the co-employee harassed claimant or the reasons that the co-employee struck the claimant. Claimant speculated that the co-employee had harassed her and struck her on the day in question because the co-employee's girlfriend was jealous of the claimant. This speculation provides the only evidence relating to the reason the co-employee struck claimant.

The Administrative Law Judge found claimant's injury to be compensable. To be compensable, an injury must arise out of and in the course of employment. K.S.A. 44-501. The two phrases "arising out of" and "in the course of" have separate and distinct meanings. Both conditions must exist before an injury is compensable. Martin v. U.S.D. No. 233, 5 Kan. App. 2d 298, 615 P.2d 168 (1980). Generally, an injury is "in the course of employment" if it occurs while performing duties for the employer. The phrase refers to the time, place and circumstances of the accident. Lentz v. City of Marion, 222 Kan. 169, 563 P.2d 456 (1977). An injury "arises out of employment" if it arises from the nature, conditions, obligations and incidents of the employment. This phrase is generally understood to require some causal connection between the employment and the injury. Martin v. U.S.D. No. 233, *supra*. In the present case, claimant's injury clearly did occur in the course of employment. The dispute concerns whether the injury arose out of the employment.

The Administrative Law Judge concluded claimant's injury did arise out of the employment. He based that conclusion on his finding that the respondent took no action, once warned, to prevent further harassment or assault. The analysis made by the Administrative Law Judge parallels the foreseeability test applied in earlier appellate decisions. In those earlier cases, injuries from a fight at work were not considered compensable unless the employer had reason to anticipate the behavior. See Peavy v. Contracting Co., 112 Kan. 637, 211 Pac. 1113 (1923).

The foreseeability test was modified in Brannum v. Spring Lakes Country Club, Inc., 203 Kan. 658, 455 P.2d 546 (1969). In that case, claimant, a supervisor, was shot by an employee claimant had terminated. The Kansas Supreme Court overruled prior case law awarding benefits only if the fight was foreseeable. The Court reasoned from the design of the Workers Compensation Act the only requirement should be a causal connection between the injury and the nature, conditions, obligations and incidents of employment. In the Brannum case, the Court found the requisite connection between work and injury existed and awarded compensation.

Although the Brannum decision indicated foreseeability should not be a limiting factor, the Court left the door open for foreseeability to enlarge the right to compensation. The Court stated:

> ". . . in all of our cases foreseeability, with the exceptions noted, has never been a factor limiting the right to compensation, although it has been permitted to enlarge the right to compensation upon a determination that horseplay or sportive acts have become incident to employment . . . . 'Foreseeability' is, after all, a term used in the law of negligence in determining responsibility for an act of fault; it has been referred to as the fundamental basis of the law of negligence. Yet negligence or culpability is no part of the basis of the employer's liability to pay workmen's compensation. So it would seem 'foreseeability' should be irrelevant as a limiting factor in determining liability for workmen's compensation which is based on work connection. . . ."

The Kansas Court of Appeals discussed the foreseeability test and applied the Brannum decision in Springston v. IML Freight, Inc., 10 Kan. App. 2d 501, 704 P.2d 394 (1985). The Springston decision involved an injury from a fight between co-employees over which one had the right to drive a particular truck. The respondent attempted to distinguish the Brannum decision on two grounds. Respondent argued that the Brannum rationale should be limited to fights between a supervisor and employee, not applied to fights between co-employees. Respondent also argued Brannum should be distinguished because the claimant in Brannum was not the aggressor in the fight. Because of these differences, respondent argued claimant's injury should not be compensable unless foreseeable. The Court of Appeals rejected both arguments and found the injury to be compensable.

In the Springston decision, the Court relied upon the Brannum decision to determine the significance of foreseeability and concluded that foreseeability should be irrelevant. The Court dropped any mention of foreseeability as a factor which may enlarge the right to compensation. Instead, the Court ties its decision on the source of the argument. The Court notes:

> "Since we have already concluded that there was evidence in this case indicating that both the scuffle and the injury arose out of a disagreement over the conditions and incidents of the job, the finding that the injury arose out of the claimant's employment must be affirmed." (Springston v. IML Freight, Inc., *supra*, at 506-507.)

From a reading of the Brannum and the Springston decisions, the Appeals Board concludes foreseeability should not be relevant to either limit or enlarge the right to compensation. The controlling factor is whether there is a causal connection between the work and the injury. An assault may arise from the employment in two circumstances. First, as with horseplay, there may be circumstances where, because the employer has condoned certain behavior, the assault becomes so intertwined with the work activities that the assault is considered to arise out of the work. Foreseeable assaults may overlap with compensable assaults, but foreseeability should not be the controlling factor, the connection with work should be. Second, injury by assault will also be compensable where, as in both Brannum and Springston, the assault results from an argument about work activities.

The facts in the present case do not fit either of the two categories. Although the evidence indicates claimant complained to her supervisor about harassment, respondent's lack of attention to the problem did not, based on the evidence presented, rise to the level

of condoning the activity. The Appeals Board considers it to be claimant's burden to show that the harassment was so condoned as to become part of the work. The record shows claimant's immediate supervisor at the time of the accident was not aware of the previous behavior and shows claimant was not aware of any action that was taken to prevent harassment. This evidence does not, in our opinion, meet the claimant's burden. Finally, the assault in this case related to personal, not work, issues.

The facts of the present case do not satisfy the requirement suggested in the Brannum and Springston cases. Both cases indicate injury from an assault stemming from an argument over work activities is compensable. There is a long line of cases from other jurisdictions indicating an assault from a personal argument imported from outside work will not be compensable. Larson's, Workmen's Compensation Law, Sec. 11.21. The present case presents a third circumstance. The dispute in this case was a private one but was not imported from outside work. It arose from the association between the claimant and co-worker at work. The Appeals Board finds no Kansas case directly dealing with this circumstance. Cases from other jurisdictions differ in their conclusion. See Larson's Workmen's Compensation Law, Sec. 11.16, 11.22.

The Appeals Board believes the most reasonable reading of the Brannum and Springston decisions requires that the assault be related to work activities by more than the fact the assault occurred at work. Both decisions emphasize the connection between the work duties and the dispute. The assault in the present case did not, in our opinion, arise from the nature, conditions, obligations or incidents of employment. The assault arose from a personal dispute. The Appeals Board, therefore, finds claimant's injury did not arise from her employment and is not compensable.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the decision by Administrative Law Judge Steven J. Howard, dated April 7, 1994, shall be, and the same is hereby, reversed.

IT IS SO ORDERED.

Dated this ____ day of December, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

Although the Brannum and Springston decisions, cited in the majority opinion, emphasize the origin of the fight in work issues, the underlying rationale is one which requires a connection between work and the injury. I believe that underlying rationale also logically requires that injury from an assault be considered compensable if the dispute arises from an association at work, even if the dispute involves personal issues. People working together form personal relationships which result in personal disputes. This view was adopted in Hartford Acc. & Indem. Co. v. Cardillo, 112 F.2d 11 (1940) and the reasons explained as follows:

> "This view recognizes that work places men [sic] under strains and fatigue from human and mechanical impacts creating frictions which explode in myriads of ways, only some of which are immediately relevant to their tasks. Personal animosities are created by working together on the assembly line or in traffic. Others initiated outside the job are magnified to the breaking point by its compelled contacts. No worker is immune to these pressures and impacts upon temperament. They accumulate and explode over incidents trivial and important, personal and official. But the explosion point is merely the culmination of the antecedent pressures. That it is not relevant to the immediate task, involves a lapse from duty, or contains an element of violation or illegality does not disconnect it from them nor nullify their causal effect in producing its injurious consequences."

In this case, the assault by a co-worker interrupted claimant in the performance of her work duties. I see no material difference between an injury resulting from an assault by a co-worker and one caused by a malfunctioning machine or tool. The connection to work is the same. The injury in this case should be considered as one arising from employment and should be compensable.

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BOARD MEMBER

c: Steven Treaster, Overland Park, KS
Robert L. Kennedy, Kansas City, KS
Steven J. Howard, Administrative Law Judge
George Gomez, Director